



**BEFORE THE
SURFACE TRANSPORTATION BOARD
Washington, D.C.**

FINANCE DOCKET 35148

**KING COUNTY, WASHINGTON
- ACQUISITION EXEMPTION -
BNSF RAILWAY COMPANY**

224/838

PROTEST

Communications with respect to this
document should be addressed to

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**Finance Docket 35148
King County, Washington - Acquisition Exemption - BNSF Railway Company**

PROTEST

In the above-referenced matter, All Aboard Washington, a non-profit citizens' organization with an interest in the maintenance and improvement of rail infrastructure, respectfully submits the following

Under the trail use agreement in this matter, BNSF Railway Company ("BNSF") would transfer its residual common-carrier rights, including the right and/or obligation to reinstitute freight rail service ("the restart right") on the subject 25.45 miles of the Woodinville Subdivision, to King County ("the County"), a non-carrier and local government entity (Form of Trail Use Agreement, Exhibit D of Response of BNSF Railway Company, Port of Seattle and King County, Washington to Request for Information, Acquisition Exemption – Certain Assets of BNSF Railway Company, Docket No. AB-6 [Sub-No. 465X], filed September 18, 2008). In its petition for exemption ("the petition"), the County asked the Board to grant it the restart right in accordance with that trail use agreement (Petition for Exemption, King County – Acquisition Exemption – BNSF Railway Company, Docket No. FD-35148, filed September 22, 2008). The petition describes the three rail segments concerned ("the railbanking segments"). For those three segments, the County has also filed for and received the applicable notices of interim trail use (NITUs) under the National Trails System Act (NTSA) and 49 C.F.R. (collectively, along with 49 U.S.C. and amendments to all three enactments, "the railbanking legislation") (Notices of Interim Trail Use, BNSF Railway Company – Abandonment Exemption – In King County, WA, Docket nos. AB-6, Sub-Nos. 463x [filed October 27, 2008], 464x [October 27, 2008], and 465x [November 28, 2008]).

All Aboard Washington respectfully asks the Board to reject the County's petition for the transfer of the restart right to the County.

Approval of the petition would establish a precedent. The Board has never granted the restart right to any party other than the railbanking railroad or its successor-in-interest. In particular, the Board has never granted the right to any interim trail user (ITU). Otherwise stated, the right has remained with the railbanking railroad under Board practice. Approval of the petition would contradict the intent of the railbanking legislation, whereby rail rights-of-way conveyed to ITUs are to be preserved for possible future rail service. An ITU's intentions by their very nature conflict with those of a rail carrier, for example, the ITU typically intends to remove the rails in order to install a trail on the rail bed. The railbanking legislation exists to mediate these conflicting interests, not to exacerbate them.

Granting the restart right to the ITU in the present case would therefore establish and condone a conflict of interest that the railbanking legislation was designed to avoid. It is in the interest of the County, the ITU, to maintain a trail, not to operate a freight railroad. The County is a typical ITU under railbanking practice. It has no experience as a carrier of freight, and it can be assumed that it would never exercise the restart right. Indeed, the petition states (Petition for Exemption, *op cit*, pp. 5-6) that "[b]ecause King County, as

trail manager, will be the entity whose interests would be most immediately impacted by a request for freight rail service on any of the Railbanking Segments, King County has agreed to acquire the right to reinstitute service from BNSF, the party who would have retained that right *by operation of the Railbanking Legislation*" (emphasis added) This statement needs to be viewed in terms of its full implications The County's interests as maintainer of a trail would argue strongly *against* its reinstituting such freight rail service, and the County's control of the restart right would in all likelihood guarantee that it would dismiss the request, however worthy it might be in terms of the transportation policy embodied in the railbanking legislation Thus, since it fails to establish any reasonable argument to the contrary, the petition here demonstrates only that the operation of the railbanking legislation should be allowed to proceed normally

Granting the petition's request would thus subvert the very purpose of the railbanking legislation Specifically, this would leave the transportation policy enunciated in section 10101 of 49 U S C unfulfilled That section calls for minimization of "the need for Federal regulatory control over the rail transportation system" (10101 [2]), and for the reduction of "regulatory barriers to entry into and exit from the industry" (10101 [7]) By contrast, the exceptional status of the restart right's holder – the County – as an ITU and non-carrier would likely create a need for *more*, not less, environmental oversight and regulatory intervention should the exercise of that right become timely The likely eventuality, however, is of course that the County would never choose to exercise that right in the first place - whatever, for example, the needs of shippers along the subdivision or the need for redundancy in the region's rail network

In May 2005 the County's executive, Ron Sims, announced his intention to turn the subject portion of the subdivision into "the granddaddy of all trails" ("Port OKs Eastside trail deal," *Seattle Post-Intelligencer*, May 13, 2008, at http://seattlepi.nwsource.com/local/362734_trail13.html) In November 2007 he told the Port of Seattle ("the Port") that plans to convert the corridor into a hiking-biking trail would be "off the table" if the Port decided to keep the tracks intact (*ibid*) Since then the County has, under pressure, softened its stance somewhat about the corridor's use for *commuter* rail, but there is no indication that the County (or the Port) has either the interest or capacity to reintroduce *freight* rail service on the railbanking segments

The donation agreement for the railbanking segments anticipates the possibility that the Board will not allow the transfer of the restart right to the County In that event, the Port "shall file with the STB a request for approval of the transfer of such right and/or obligation to the Port or to another entity designated by Port and approved by STB" (Donation Agreement [Woodinville Subdivision – South Rail Line], at http://www.portseattle.org/downloads/business/realstate/Donation_Agr_South_Segment_PDF, pp 13-14) However, the Port, like the County, has demonstrated no interest in operating freight rail traffic on the line in question According to the *Post-Intelligencer* article cited in the foregoing paragraph, the Port "isn't interested in long-term ownership of the corridor" The article quotes John Creighton, president of the Port of Seattle Commission, as saying that "we view ourselves as bridge financiers" Further, the trail use agreement's recitals state that "the Port does not desire to take on any rail operating responsibility with respect to the Subdivision" (Form of Trail Use Agreement, *op cit*, p 1) In terms of the railbanking legislation's policy intent, a transfer of the restart right to the Port would thus be no better than its transfer to the County

While no ITU has ever sought the restart right in a proceeding before the Board, a pending case would allow a freight railroad that is neither the railbanking railroad nor its successor-in-interest to reintroduce freight rail service on a railbanked line In that case, R J Corman has filed to reactivate 9.3 miles of track in Pennsylvania that were railbanked

in 1990 by Conrail under the railbanking legislation (Notice of Exemption, R J Corman Railroad Company/Pennsylvania Lines – Acquisition and Operation Exemption – Line of Norfolk Southern Railway Company, Docket No FD-35143, filed May 20, 2008) Even if Corman is granted the restart right, however, that cannot be construed a precedent that would justify granting the restart right to the County in the present matter First, Corman is not an ITU Secondly, while Corman is neither the railbanking railroad nor its successor-in-interest, its core activity is freight railroad operation, making its situation similar to that of the railbanking railroad (or, more precisely in this case, the railbanking railroad's successor-in-interest)

Granting the County's petition in the present matter would therefore create a conflict of interest and subvert the intent of the railbanking legislation, *to* , to preserve unused rail corridors for possible future freight use We accordingly ask respectfully that the Board reject the County's petition, and that the Board also pre-emptively reject the alternative of transferring the restart right to the Port or another non-carrier entity

Respectfully submitted,

A handwritten signature in cursive script, reading "Lloyd H Flen".

Lloyd H Flen
Executive Director
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March 23, 2009

CERTIFICATE OF SERVICE

I, Lloyd H Flem, hereby certify that a true and correct copy of the within protest has been served by first-class U S mail mailed this 23rd day of March, 2009, on the following counsel of record

Charles A Spitulnik
Kaplan Kirsch & Rockwell LLP
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Washington, DC 20036
Attorney for King County, Washington

A handwritten signature in cursive script that reads "Lloyd H Flem". The signature is written in black ink and is positioned above a horizontal line.

Lloyd H Flem
Executive Director
All Aboard Washington